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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF MEDICINE BOW FUEL & POWER AIR PERMIT CT-5873	)))	Docket No. 09-2801

DEQ'S RESPONSE OPPOSING SIERRA CLUB'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

Respondent, the Wyoming Department of Environmental Quality (DEQ) by and through its undersigned counsel, hereby responds in opposition to *Sierra Club's Motion for Partial Judgment on the Pleadings* and respectfully requests this Council deny Sierra Club's[1] Motion because both Medicine Bow Fuel & Power, LLC's (MBFP) Response and the DEQ's Response denied material factual allegations contained in Claims I and V of the Sierra Club's Protest and Petition for Hearing (Petition).

I. BACKGROUND AND STATEMENT OF UNDISPUTED FACTS

On December 31, 2007, the DEQ received a permit application (Application AP-5873) from Medicine Bow Fuel & Power, LLC (MBFP) to construct an underground coal mine (Saddleback Hills Mine) and an industrial gasification and liquefacation plant that

[1] The Protest and Petition lists two Protestants: Sierra Club Wyoming Office and Sierra Club National Office. However because the Protestants refer to themselves in the singular, the DEQ has adopted Protestants' convention for purposes of this memorandum.

will produce transportation fuels and other products (Medicine Bow IGL Plant) (collectively, the Facility) to be located approximately eleven miles southwest of Medicine Bow, in Carbon County, Wyoming. *See* Petition at ¶¶ 1, 5; DEQ Response at ¶¶ 1, 5; and MBFP Response at ¶¶ 1, 5. A general description of the processes for the Medicine Bow IGL Plant include coal preparation, gasification, syngas condition, acid gas removal, methanol synthesis, methanol to gasoline, CO_2 recovery and production, sulfur recovery and production, power generation, and an air separation unit. *See* Petition at ¶ 5; DEQ Response at ¶ 5; MBFP Response at ¶ 5. The Saddleback Hills Mine will have a maximum calendar year production rate of approximately 3.2 million tons. *See* Petition at ¶ 5; DEQ Response at ¶ 5; MBFP Response at ¶ 5.

The DEQ conducted an analysis of Application AP-5873 (Permit Application Analysis) that included proposed permit conditions and made the Permit Application Analysis available for public comment on July 3, 2008. *See* Petition at ¶ 2; DEQ Response at ¶ 2; and MBFP Response at ¶ 2. After receiving written public comment, the DEQ held a public hearing. *See* Petition at ¶ 3; DEQ Response at ¶ 3; and MBFP Response at ¶ 3. On March 4, 2009, the DEQ/AQD granted approval to construct the Medicine Bow IGL Plant as described in Application AP-5873. *See* Petition at ¶ 4; DEQ Response at ¶ 4; and MBFP Response at ¶ 4.

On May 4, 2009, the Sierra Club filed a Petition seeking vacature of the Permit. Petition at 22. The Petition raises eight claims, including two claims that are the subject of the Sierra Club's Motion (Claims I and V). Specifically, the Sierra Club seeks a judgment that the DEQ failed to consider sulfur dioxide emissions from flares in

determining the source's potential to emit and failed to apply BACT [Best Available Control Technology] to the flares (Claim I). Motion at 1, Petition at ¶¶ 36 – 47. The Sierra Club also seeks a judgment that the DEQ failed to model impacts of particulate matter fugitive emissions (Claim V). Motion at 1, Petition at ¶¶ 62-65.

On August 3, 2009, the Sierra Club moved for judgment on the pleadings as to Claims I and V.[2] The Sierra Club represented that "[t]wo material facts are undisputed after the pleadings." Motion at 1-2 (citing MBFP Response at ¶¶ 41-42). The Sierra Club also represented that "Medicine Bow concedes that it did not include fugitive PM emissions in its modeling of the facility's 24-hour impacts." Motion at 11 (citing MBFP Response at ¶ 62). Noticeably absent from Sierra Club's Motion is any mention of their remaining allegations regarding Claims I and V. Even more noticeable is the complete absence of any reference whatsoever to DEQ's Response. Quite possibly this could be because the DEQ's Response, on its face, is sufficient to defeat the Sierra Club's Motion. *See* DEQ Response at ¶ 41 ("**Denied**"); ¶ 42 ("DEQ asserts that Application AP-5873 speaks for itself and paraphrasing Application AP-5873 is not an allegation of fact which requires a response. To the extent a response is required, the DEQ **denies** the remainder

[2] Pleadings give notice of what an adverse party may expect are issues – issues are formulated through the discovery process and pre-hearing conferences. *See BB v. RSR*, 2007 WY 4, ¶ 13, 149 P.3d 727, 733 (Wyo. 2007). "Pleadings" are not defined in the EQC RPP. Rule 7 of the Wyoming Rules of Civil Procedure describes "pleadings" as including a complaint, answer, reply to a counterclaim, an answer to a cross-claim, a third-party complaint, and a third-party answer. The type of pleadings mentioned in WYO. R. CIV. P. Rule 7 are pertinent to judicial proceedings, not administrative proceedings. Therefore, for this administrative proceeding, the DEQ assumed that the Petition and Responses are the "pleadings." Thus, the Council's evaluation of the Sierra Club's Motion is limited to the Petition and Responses.

of this paragraph." (emphasis added)); ¶ 62 ("**Denied**"); ¶ 92 ("DEQ **denies** each and every allegation in the Sierra Club's Protest and Petition for Hearing not specifically admitted").[3]

By itself, the denial of material factual allegations is sufficient to defeat a motion for judgment on the pleadings. *See Greeves v. Rosenbaum*, 965 P.2d 669, 671 (Wyo. 1998) (judgment on the pleadings is appropriate only if all material allegations of fact were admitted in the pleadings). The DEQ and MBFP denied material factual allegations contained in Claims I and V of the Petition. Because the Sierra Club's Motion is insufficient as a matter of law, the Council has no choice but to deny it.

II. STANDARD OF REVIEW

The EQC's Rules of Practice and Procedure (RPP) incorporate by reference applicable Wyoming Rules of Civil Procedure. 2 RPP § 14. Rule 12 of the Wyoming Rules of Civil Procedure provides in pertinent part:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

W.R.C.P. 12(c).[4]

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[3] This memorandum does not address the Sierra Club's misrepresentations and mischaracterizations of MBFP's Response because it is DEQ's understanding that MBFP intends to file a separate response to the Sierra Club's Motion addressing such misrepresentations.

The standard for reviewing a judgment on the pleadings is similar to that of a motion to dismiss for failure to state a claim upon which relief can be granted. *Newport Int'l Univ., Inc. v. Wyo. Dep't of Educ.*, 2008 WY 72, ¶ 12, 186 P.3d 382, 386 (Wyo. 2008); *Ecosystem Res., L.C. v. Broadbent Land & Res., L.L.C.*, 2007 WY 87, ¶ 8, 158 P.3d 685, 687 (Wyo. 2007). The Council is to review the facts "in the light most favorable to the party opposing the motion." *Id.* If an issue of fact exists, the motion should be denied. *Id.* at 688.

A party is entitled to judgment on the pleadings if the undisputed facts appearing in the pleadings, supplemented by any facts of which the council may take judicial notice, establish that no relief can be granted.[5] *See Johnson v. Griffin*, 922 P.2d 860 (Wyo.

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[4] The Council should not convert the Sierra Club's Motion to a motion for summary judgment at this preliminary stage of the proceedings. If the Council decides to treat the Sierra Club's Motion as a motion for summary judgment, the DEQ requests the Council continue the motion until November 16, 2009, the deadline for filing post-discovery motions, so that the DEQ and MBFP may complete discovery and appropriately respond.

[5] In deciding the Sierra Club's Motion, the rules require the Council only look to the pleadings. However, attached to the Sierra Club's Motion are several exhibits the Sierra Club purports as being various EPA memorandum. *See* Motion at 6 (referring to Exhibits 1 and 2) and 7 (referring to Exhibits 3 and 4). The Sierra Club did not provide the websites or other verification so that the Respondents, or the Council, could verify whether such exhibits were truly official EPA memorandum. Further, the Sierra Club completely failed to aver that these were even true and accurate copies. *See Hamilton v. Paulson*, 542 F.Supp. 2d 37, 52 at n. 15 (D.D.C. 2008) (documents maintained on agency website are subject to judicial notice). Therefore, the Council should not take judicial notice of such documents. Furthermore, the Sierra Club's Motion references numerous other documents that are not attached to their Motion or are not yet part of the record before the Council. *See e.g.*, Motion at 8 (EPA Comments on Medicine Bow's PSD Application at 3). Such documents cannot be considered at this time because they are not pleadings. *See discussion supra* at footnote 2. Therefore, the Council should disregard any of the Sierra Club's arguments referencing such documents until the documents are properly before the Council.

1996). Conclusions of law, however, are not deemed admitted. *See Rosenhan v. United States*, 131 F.2d 932 (10th Cir. 1942) *cert. denied* 318 U.S. 790 (1943); *see also* WYO. R. CIV. P. 8(d) ("Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided"). Therefore, a judgment on the pleadings is only appropriate if all material allegations of fact have been admitted in the pleadings and only questions of law remain.[6] *Id.*; *see also Box L Corp. v. Teton County*, 2004 WY 75, ¶ 2, 92 P.3d 811 (Wyo. 2004)(quoting *Rodriguez v. Casey,* 2002 WY 111, ¶ 4, 50 P.3d 323, 325 (Wyo. 2002)).

III. ARGUMENT

A. The Sufficiency of the Sierra Club's Motion must be determined by the Facts Pled

Persons objecting to a permit must file a petition setting forth a statement of the facts on which the protest is based and the law alleged to have been violated. 1 EQC RPP § 3(c)(iii). Then, the DEQ and/or Permittee must file a response. 2 EQC RPP § 1. Thus, the DEQ looked to the Petition to determine the Sierra Club's factual allegations.

However, the Sierra Club's Motion includes references to numerous extra-pleading material including at least five websites, four exhibits and four other documents. Therefore, to the extent the Sierra Club's Motion relies on material that was not part of the "pleadings," the Council must ignore such references and instead, determine the sufficiency of the Motion by evaluating the Petition and the Responses.

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[6] Material facts are facts having legal significance. *Olson v. A.H. Robins Co.*, 696 P.2d 1294, 1300 (Wyo. 1985). No issue of fact exists when the parties agree to the facts. Pursuant to the Council's July 2, 2009 scheduling order, discovery continues until October 30, 2009, except for expert depositions which concludes by November 13, 2009.

Disputed issues of fact cannot be decided by a motion for judgment on the pleadings. WYO. R. CIV. P. 12(c). By definition, each and every time the DEQ or MBFP denied facts alleged in the Sierra Club's Petition, those facts became disputed issues of fact. Because the DEQ and MBFP have denied facts alleged in Claims I and V, the Sierra Club has failed to show that there are no issues of material fact on the face of the pleadings. Therefore, this Council must deny the Sierra Club's Motion.

B. There are Issues of Material Fact as to Claim I

The most direct way for the Council to determine whether there are disputed issues of fact is to compare the Sierra Club's allegation in their Petition with the corresponding DEQ and MBFP Response. Petition Claim I contains twelve separately enumerated paragraphs. Petition at ¶¶ 36-47. The Sierra Club's Motion discusses five of those allegations, and the DEQ and MBFP's Responses **deny** such allegations in whole or in part as follows:

> **Petition ¶ 40.** The final Permit does not include a BACT determination for sulfur dioxide emissions because SO2 emissions are estimated under the 40 tpy major source significance threshold at 32.9 tpy, excluding SO2 emissions from flares. If flare emissions were considered, SO2 emissions would exceed the PSD major source significance threshold.
>
> **DEQ Response ¶ 40. Denied.**
>
> **MBFP Response ¶ 40.** MBFP **denies** the allegations in paragraph 40 that WDEQ failed to impose BACT on the flares and **further denies** that the sulfur dioxide emissions from the MBFP Facility exceed the major source significance threshold for PSD. WDEQ considered flare emissions from normal operations and maintenance in the Facility's total PTE. The total sulfur dioxide PTE from the Facility from normal operations and maintenance is 36.6 tpy, which is less than the PSD significance threshold. However, WDEQ determined that BACT was required for the flares and that the

Startup, Shutdown and Minimization (SSM) Plan, required by the Permit, is BACT for the flares. (Decision Document at III.1, III.3 and IV.6).

Petition ¶ 41. The Application and WYDEQ's Permit Application Analysis estimated SO2 emissions of 256.9 tpy from cold starts, yet did not consider these significant emissions in the source's potential to emit. These documents also show the flares will emit 3.9 tpy VOCs, 82.3 tpy CO, and 10.5 tpy NOx. Cold starts are a routine, predictable event associated with the operation a liquid coal plant.

DEQ Response ¶ 41. Denied.

MBFP Response ¶ 41. MBFP **denies** paragraph 41 that WDEQ was obligated to consider emissions from a cold start in its calculation of PTE. (Decision Document at III.1) Cold starts are a non-routine event, occurring during the initial startup and commissioning of the Facility before it achieves normal operation. Thus cold start-up emissions are not routine and the emissions from cold starts are not included in PTE calculations.

Petition ¶ 42. The Application also estimated SO2 emissions of 150.16 tpy from anticipated malfunctions and other events.

DEQ Response ¶ 42. DEQ/AQD asserts that Application AP-5873 speaks for itself and paraphrasing Application AP-5873 is not an allegation of fact which requires a response. To the extent a response is required, the DEQ/AQD **denies** the remainder of this paragraph.

MBFP Response ¶ 42. MBFP **admits** the allegations in paragraph 42 that the potential amount of SO2 emissions from anticipated malfunctions and other non-routine events **could be** 150.16 tpy, but to the extent that Sierra Club is suggesting these emissions should have been included in the calculations for determining whether the Facility is a major source of SO2, MBFP **denies** the allegations. WDEQ correctly concluded that the Facility is not a major source of SO2.

Petition ¶ 43. Medicine Bow acknowledged in a letter to WYDEQ that SO2 emissions are above the major source threshold and that SO2 emissions must undergo PSD review.

DEQ Response ¶ 43. DEQ/AQD asserts that the letter speaks for itself and paraphrasing the letter is not an allegation of fact which requires a response. To the extent a response is required, the DEQ/AQD **denies** the remainder of this paragraph.

MBFP Response ¶ 43. MBFP **denies** the allegations in paragraph 43 to the extent they provide an inaccurate description of the correspondence between MBFP and WDEQ. In a letter to WDEQ, dated October 14, 2008, MBFP stated that potential sulfur dioxide emissions would exceed PSD significance thresholds if startup emissions are included in facility PTE. In response to inquiries from WDEQ, MBFP submitted additional information on November 11, 2008 that distinguished routine emissions from non-routine emissions. PTE for routine emissions of sulfur dioxide is 36.6 tpy, which is below the PSD major source threshold. (Decision Document at III.1).

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Petition ¶ 46. The Permit also acknowledged that emissions of VOCs, CO and NOx exceed the PSD significance threshold, and the Permit acknowledged these pollutants are emitted by the flares, yet WYDEQ did not apply BACT to emissions of any pollutants from the flares.

DEQ's Response ¶ 46. Denied.

MBFP's Response ¶ 46. MBFP **admits** the allegations in paragraph 46 to the extent they simply confirm that the facility emissions for volatile organic compounds, carbon monoxide and oxides of nitrogen trigger the PSD significance thresholds. MBFP **denies** that WDEQ did not apply BACT to control emissions of these pollutants from the flares. The SSM Plan represents BACT for flares.

Petition at ¶¶ 40-43, 46; DEQ Response at ¶¶ 40-43, 46; MBFP Response at ¶¶ 40-43, 46 (emphasis supplied).

Taking each and every allegation of fact as to Claim I which was discussed by Sierra Club in their Motion, and comparing such allegations to the DEQ's and MBFP's Responses shows that both the DEQ and MBFP clearly dispute the Sierra Club's

allegations of fact. And, although not discussed by the Sierra Club, a comparison of the remaining Claim I allegations and corresponding DEQ and MBFP responses also shows that the DEQ and MBFP dispute those allegations. *See* Petition at ¶¶ 36 – 39, 44-45, 47; DEQ Response at ¶¶ 36-39, 44-45, 47 and 92 (general denial of allegations not specifically admitted); MBFP Response at ¶¶ 36-39, 44-45, 47 and general denial statement.

Because the Sierra Club has failed to show that there are no issues of material fact on the face of the pleadings as to Claim I, this Council must deny the Sierra Club's Motion.

C. There are Issues of Material Fact as to Claim V

Following the same approach for Claim V yields a similar result. Petition Claim V contains four separately enumerated paragraphs. Petition at ¶¶ 62-65. The Sierra Club's Motion discusses only one of those allegations, and the DEQ and MBFP's Responses **deny** such allegation in whole or in part as follows:

> **Petition ¶ 62.** Neither WYDEQ nor the Applicant modeled impacts of fugitive emissions of particulate matter.
>
> **DEQ's Response ¶ 62. Denied**
>
> **MBFP's Response ¶ 62.** MBFP **admits**, consistent with WDEQ's longstanding policy and 1994 Memorandum of Agreement (MOA) with the EPA, it did not model the impacts of fugitive emissions of particulate in short-term 24-hour modeling. Annual fugitive particulate emissions, however, were modeled. To the extent paragraph 62 suggests the modeling required by WDEQ is inadequate, MBFP **denies** the allegations.

Petition at ¶ 62; DEQ Response at ¶ 62; MBFP Response at ¶ 62; *see also* DEQ Response at ¶ 92 (general denial of allegations not specifically admitted); MBFP Response at 23 (general denial of allegations not specifically admitted).

Because the Sierra Club has failed to show that there are no issues of material fact on the face of the pleadings as to Claim V, this Council must deny the Sierra Club's Motion.

VI. CONCLUSION

The Sierra Club failed to properly bring a Motion for Judgment on the Pleadings. The Sierra Club's Motion seeks a determination from the EQC on the merits of Claims I and V of their Petition. The Sierra Clubs' Motion states that "[t]wo material facts are undisputed after the pleadings" and cites to Medicine Bow's Response. Motion at 1-2. The Sierra Club failed to inform the EQC that both the DEQ's Response and MBFP's Response denied material allegations related to those Claims. Because the DEQ and Medicine Bow denied material allegations, there are issues of material fact precluding the EQC from granting the Sierra Club's Motion.

DATED this 17th day of August, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing DEQ'S RESPONSE OPPOSING SIERRA CLUB'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS through United States mail, postage prepaid on this 17th day of August, 2009 addressed to the following:

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